

**Office of Chief Counsel
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memorandum**

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subject: Timeliness of Claims for Refund under Sections 34 and 6511

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

X =

Y =

\$a =

\$b =

Year 1 =

Year 2 =

Year 3 =

ISSUES

Whether X's claims for refund of income tax for tax years Year 1 and Year 2 are barred under the look back provisions of section 6511(b).

CONCLUSIONS

No. X's claims are not barred by the look back provisions because the tax was deemed paid on the statutory due dates of the respective Year 1 and Year 2 income tax returns, which dates are within the three-year period preceding the claims.

FACTS / BACKGROUND

X is a corporation not subject to Federal income tax under a tax treaty. X is also exempt from certain fuel excise taxes under certain circumstances and provided that proper documentation for the exemption exists. In Year 1 and Year 2, due to mismatched documentation, X was improperly charged an amount equal to the excise tax on aviation fuel by Y (an oil company), in the amounts of \$a and \$b respectively. The tax imposed by section 4081 had previously been imposed on this fuel.

As a result, X could have been entitled to payments as an ultimate purchaser of the aviation fuel by section 6427(l), but X did not meet the timing requirements of 6427(i). X sought relief under section 34 to receive a refundable income tax credit in lieu of payment under section 6427(l). Section 34 provides for such a credit, equal to the amount otherwise payable under section 6427. X filed claims for refund of income tax in the amounts of \$a and \$b for tax years Year 1 and Year 2, respectively on October 18, Year 3.

LAW AND ANALYSIS

Section 6511 contains two separate timeliness provisions that apply to claims for refund. First, section 6511(a) establishes a filing deadline on the claim for refund, which is three years from the time the return was filed or two years from the time the tax was paid, whichever expires later, or if no return was filed by the taxpayer, within two years from the time the tax was paid; second, section 6511(b) limits the amount of the refund based on looking back either two or three years from the date the claim is filed. Hof v. United States, 2009 WL 464364 at 1 (D.S.D.) (citing Commissioner v. Lundy, 516 U.S. 235, 240 (1996)). Where (as in this case) a tax return is filed, the deadline for filing a claim for refund is three years from the date the tax return is filed or two years from payment, whichever is later. I.R.C. § 6511(a).

In this case X filed income tax returns, Forms 1120-F, on October 18, Year 3. The Forms 1120-F contained X's claims for refund.¹ X's simultaneous filing of income tax returns and claims for refund for Year 1 and Year 2 meets the three-year requirement of section 6511(a); X timely filed both its Year 1 and Year 2 claims.

Where a claim is filed within such three-year period under section 6511(a), the look back period is the three-year period preceding the claim, plus any extension of time for filing the tax return. I.R.C. § 6511(b)(2)(A). Under section 6511(b)(2)(A), the amount of the credit or refund may not exceed the portion of the tax paid within this "look back" period.

Determining the tax paid date for purposes of section 6511(b)(2)(A) is less straightforward in this case. Section 34 gives taxpayers a refundable credit against income tax, without requiring any income tax to have been actually paid.² This credit is allowable even though X did not have any income tax liability. See §§ 6401(b)(1) and (c).

For purposes of establishing the tax paid date, we analogize to the earned income tax credit (EITC), another refundable credit, where the taxpayer frequently has never actually paid any income tax but is still entitled to a refund of income tax. When determining the period of limitation for claiming a refund based on the EITC, courts have deemed a constructive payment of income tax and have deemed this constructive payment to occur as of the statutory due date of the income tax return for the tax year at issue. See Israel v. United States, 356 F.3d 221, 224-25 (2d Cir. 2004). The rationale for this constructive payment analysis is grounded in the recognition that the EITC creates an overpayment of taxes where there has been no actual payment of the tax at issue. Id. at 223-24. In determining the tax paid date, the Second Circuit found section 6513(b) was applicable.³ The court analogized the EITC to wage withholding taxes and concluded that "a logical and consistent reading of the Code" demanded that section 6513(b) apply to both those amounts a taxpayer did pay and those a taxpayer did not, in fact, pay. The court further noted that the purpose of the section 6511 look back rule is to prevent stale claims and that its holding that section 6513(b) is applicable supported Congresses' intent. Id. at 225-6.

In this case, in lieu of an individual taxpayer who would have taxable wages, and therefore, wage withholding, we analogize to the generic corporate taxpayer who would have taxable income and therefore estimated tax payments. Both withholding and estimated tax payments are considered pre-paid income tax and both are subject to section 6513(b). Given the courts' analysis of tax paid in the EITC refund context, we

¹ Pursuant to Rev. Rul. 69-406, 1969-2 C.B. 261, a taxpayer *must* file its claim for refund under section 34 on an income tax return, regardless of whether or not it must otherwise file an income tax return.

² Note, X's payment to Y of an amount equal to Y's excise tax liability is not relevant for section 6511 purposes because X is seeking a refund of income tax under section 34.

³ While the constructive payment is a legal fiction, it is a necessary one because without it the Code's refundable credit provisions would be unworkable.

believe they would similarly hold that there is a constructive payment of income tax when a taxpayer has a section 34 refundable credit, and that said payment is deemed paid as of the statutory due date of a corporation's income tax return. The income tax return due date for a corporation such as X is March 15 of the year following the taxable year. Thus X's constructive payments under section 34 are deemed paid as of that date.

With respect to tax year Year 1, X filed its claim for refund on October 18, Year 3. Under section 6511(b)(2)(A), the Year 1 refund is limited to the portion of tax paid within the applicable look back period of three years. Under the analysis above, there is a constructive payment of income tax in the amount of \$a, deemed paid on March 15, Year 2. This is within the applicable look back period.

With respect to tax year Year 2, X filed its claim for refund on October 18, Year 3. Under section 6511(b)(2)(A), the Year 2 refund will be limited to the portion of tax paid within the applicable look back period of three years. Under the analysis above, there is a constructive payment of income tax in the amount of \$b, deemed paid on March 15, Year 3. As with the tax year Year 1 claim, this is within the applicable look back period.

In sum, X's claims for refund are timely under section 6511(a), and are not barred by the look back provisions of section 6511(b)(2)(A) because the tax was deemed paid on the statutory due dates of the Year 1 and Year 2 income tax returns, March 15, Year 2 and March 15, Year 3, respectively, which dates are within the three-year period preceding the claims.

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